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No. 90-238

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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Respondent Rosenstein attempts to discourage this Court from reviewing this case by stating that "the issues of this case are extremely fact specific and only questions of evidence and factual findings are involved . . . " (Respondent's Brief in Opposition, p. 5). Rosenstein makes this claim but never elaborates on how this case is so fact specific or which factual findings are involved. Instead, he attempts to create confusion and a factual quagmire where they do not exist.

The most obvious example of his attempt to create confusion involves his completely new argument concerning his April 28th letter to the Dallas chief of police.

The City of Dallas has contended all along that Rosenstein was not entitled to a name-clearing hearing because he never requested such a hearing. It is Rosenstein who, at this late stage in the case, attempts to argue a new factual basis for his contention that he requested a name-clearing hearing. In addition, Rosenstein misstates the law regarding policymakers under 42 U.S.C. § 1983 and the law regarding waiver of damages issues. Each of these issues will be addressed below.

A. Rosenstein Improperly Submits a New Factual Basis For His Contention That He Requested a Name-Clearing Hearing.

At the time of his discharge, Rosenstein knew that he was entitled to a name-clearing hearing (*see* TR. 96-97). Despite this knowledge, Rosenstein's May 17, 1985 letter of appeal to the Dallas city manager never once mentioned his desire to have a name-clearing hearing. The plain language of his May 17th letter indicated that he wanted to appeal his discharge.

Because Rosenstein completely failed to make a request for a name-clearing hearing, he was later compelled to take the position that his May 17th letter of appeal to the city manager should have been considered a request for a name-clearing hearing (*see* TR. 96-97). Until now, that has been Rosenstein's position. Now, however, Rosenstein contends that another letter, one written almost two weeks prior to his discharge, should be read together with his May 17th letter of appeal to constitute his request for a name-clearing hearing. There are a number of reasons why this Court should reject Rosenstein's new argument.

First, Rosenstein waived his right to assert that his April 28th letter to the Dallas police chief constituted a request for a name-clearing hearing since he never made that assertion in the lower courts. Ordinarily, this Court does not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Since Rosenstein never raised the issue before, the lower courts never resolved the issue and this Court should not address the issue. Rosenstein waived his right to argue that his April 28th letter to the police chief constituted a request for a name-clearing hearing.

Second, the plain language of Rosenstein's April 28th letter indicates that he was merely seeking a transfer, *not* a name-clearing hearing (*see* PL. Ex. 29, A.6. "All I ask is to get me away from the North East Division and transfer me to South East. . . . "). Rosenstein makes no attempt to explain how his specific request for a transfer should be interpreted as a request for a name-clearing hearing.

Third, Rosenstein's April 28th letter to the chief of police was written *before* he was terminated and *before* any allegedly defamatory statements were made about him. Rosenstein makes no attempt to explain how he could have been requesting a name-clearing hearing before he was discharged and before he was allegedly defamed.

Finally, Rosenstein fails to mention that his April 28th letter to the chief of police was written at the police chief's direction as part of an internal affairs investigation. Rosenstein knows full well that his "Dear Chief" letter was required of him as part of the standard procedure the Dallas police department follows in internal affairs investigations. It was Rosenstein's April 28th "Dear Chief" letter that allowed Rosenstein to tell his side

of the story to the police department prior to any imposition of discipline. Rosenstein makes no attempt to explain how his April 28th "Dear Chief" letter, written as it was in the context of an internal affairs investigation, could have reasonably been understood as a request for a name-clearing hearing.

B. The Dallas Chief of Police Is Not a Policymaker.

The City of Dallas contends that it cannot be held liable under 42 U.S.C. § 1983 for the acts or decisions of its police chief since the chief's decisions are subject to review by the city manager and ultimately by the city council. In response, Rosenstein claims that Dallas City Charter, Chapter III, § 15 (*see* PL. Ex. 63, A.17) prohibits the city council from interfering with the appointments or subordinates of the city manager. Assuming, arguendo, that Rosenstein is correct, it is still undisputed that the police chief's decisions are subject to review by the city manager. According to this Court's decisions in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Dallas police chief is not a final policymaker and, therefore, his actions or decisions cannot make the City of Dallas liable under 42 U.S.C. § 1983.

C. The City of Dallas Has Not Waived Any Damages Issues.

The City of Dallas contends: (1) that in an action under 42 U.S.C. § 1983 for denial of a name-clearing hearing, a discharged probationary employee is not entitled to recover damages for general loss of reputation and

(2) that the district court committed plain error by submitting damages issues disjunctively thus allowing recovery for denial of a name-clearing hearing or for slander. In response, Rosenstein claims that the City of Dallas has waived its right to argue any damages issue.

First, Rosenstein never raised this argument before either the district court or the court of appeals. The issue was first raised sua sponte by the court of appeals in its en banc decision. Since Rosenstein never raised this argument before, he cannot rely on it now. *Youakim v. Miller*, at 234. Second, as this Court decided in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the failure of a city to object to a jury charge concerning damages does not necessarily foreclose the issue from appellate review. In this case both damages issues are significant ones which are likely to effect numerous cities. The issue concerning damages for slander or for a denial of a name-clearing hearing, for example, raises serious concerns of fairness and justice. The result of the lower court's decisions is to allow recovery for slander even though the lower court determined that, as a matter of law, no slander was established. If the award of damages is allowed to stand, it would result in a manifest injustice to the City of Dallas. Such a result calls for review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Assistant City Attorney

September 1990.